

STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS
PROVIDENCE, Sc.

**DISTRICT COURT
SIXTH DIVISION**

Henry Rose Sr.	:	
	:	
v.	:	A.A. No. 14 - 127
	:	
Department of Labor and Training,	:	
Board of Review	:	

ORDER

This matter is before the Court pursuant to § 8-8-8.1 of the General Laws for review of the Findings & Recommendations of the Magistrate. After a de novo review of the record, the Court finds that the Findings & Recommendations of the Magistrate are supported by the record, and are an appropriate disposition of the facts and the law applicable thereto. It is, therefore,

ORDERED, ADJUDGED AND DECREED,

that the Findings & Recommendations of the Magistrate are adopted by reference as the Decision of the Court and the Board of Review's decision is **AFFIRMED**.

Entered as an Order of this Court at Providence on this 9th day of January, 2015.

By Order:

/s/
Stephen C. Waluk
Chief Clerk

Enter:

/s/
Jeanne E. LaFazia
Chief Judge

STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS
PROVIDENCE, Sc. DISTRICT COURT
SIXTH DIVISION

Henry Rose Sr. :
v. : A.A. No. 14 - 127
Department of Labor and Training, :
Board of Review :

FINDINGS & RECOMMENDATIONS

Ippolito, M. In this case Mr. Henry Rose Sr. urges that the Board of Review of the Department of Labor and Training erred when it held that Mr. Rose would be disqualified from receiving unemployment benefits because he was not fully available for work within the meaning of Gen. Laws 1956 § 28-44-12. Jurisdiction to hear and decide appeals from decisions made by the Board of Review is vested in the District Court by Gen. Laws 1956 § 28-44-52. This matter has been referred to me for the making of findings and

recommendations, pursuant to Gen. Laws 1956 § 8-8-8.1. For the reasons stated below, I conclude that the instant matter should be AFFIRMED on the issue of claimant's disqualification; I so recommend.

I

FACTS AND TRAVEL OF THE CASE

Mr. Rose was receiving benefits when, on June 2, 2014, a designee of the the Director determined he failed to meet the Availability/Job Search requirements of Gen. Laws 1956 § 28-44-12 and Rule 17(F) of the unemployment insurance rules during the period from the week ending April 19, 2014 through the week ending May 10, 2014 in that he did not utilize the Tele-Serve payment system — and was thereby disqualified from receiving unemployment benefits. Decision of Director, July 15, 2014, at 1. Claimant appealed and a hearing was held before Referee Carl Capozza on July 14, 2014, at which time Mr. Rose was the sole witness.

On July 15, 2014, the Referee issued a decision in which he found the following facts:

Prior to the week ending April 19, 2014 the claimant received notification and directives from the Department of Labor and Training concerning the use of the Tele-serve payment system when processing his claim of benefits. On March 10, 2014, the

claim was advised to commence use of the Tele-serve payment system for the week ending March 29, 2014. The claimant did acquire a pin number and did process a claim for benefits for that week but failed to continue doing so for the following week. The claimant was once again advised as to the proper use of the Tele-serve payment system and the continuing use of that system for subsequent weeks. The claimant failed to do so on at least two other occasions requiring the Department to re-file his claim. As a result of his failure to utilize the Tele-serve payment system as required he was denied benefits for the weeks ending April 19, 2014 through May 10, 2014.

Referee's Decision, July 15, 2014, at 1. And after quoting extensively from Rule 17(f) Employment Security Act rules, the Referee — based on the findings recited above — pronounced the following conclusions:

Based on the credible testimony and evidence of record, I find that the claimant has failed to establish good cause for his non-compliance with the requirements of Rule 17(F) for the weeks ending April 19, 2014 through May 10, 2014 as previously determined by the Director. Benefits for that period are denied.

Referee's Decision, July 15, 2014, at 2. Accordingly, Referee Capozza found the claimant ineligible to receive benefits.

Claimant filed an appeal from this decision and the matter was heard by the Board of Review. On August 20, 2014, the Board of Review issued a unanimous decision which held that the decision of the Referee was a proper adjudication of the facts and the law applicable thereto. Accordingly, the

decision of the Referee was affirmed. Thereafter, on September 19, 2014, Mr. Rose filed a complaint for judicial review in the Sixth Division District Court.

II APPLICABLE LAW

This case centers on the application of the following provision of the Rhode Island Employment Security Act, which enumerates one of the several grounds upon which a claimant may be deemed ineligible to receive unemployment benefits. Gen. Laws 1956 § 28-44-12(a), provides:

28-44-12. Availability and registration for work. -- (a) An individual shall not be eligible for benefits for any week of his or her partial or total unemployment unless during that week he or she is physically able to work and available for work. To prove availability for work, every individual partially or totally unemployed shall register for work and shall:

(1) File a claim for benefits within any time limits, with any frequency, and in any manner, in person or in writing, as the director may prescribe;

(2) Respond whenever duly called for work through the employment office; and

(3) Make an active, independent search for suitable work.

(b) * * *.

As one may readily observe, subsection 12(a) requires claimants to be able and available for full-time work and to actively search for work. It is the burden of the claimant to prove compliance with these requirements.

Also pertinent to this case is a provision of the Rules of the Department of Labor And Training for the Unemployment Insurance and Temporary Disability Insurance Programs — Rule 17(F)¹ — which I regard as providing specificity to the general mandate of § 28-44-12(a)(1):

Any individual who fails to contact the department utilizing the Telephone Automated Payment System, Tele-Service, or who fails to contact the Department for their scheduled telephone interview, or who fails to return to the department's Call Center, the mail payment certification form by the end of the week following the week or weeks requested, shall not be eligible to establish credit for a waiting period or to receive benefits for the week or weeks during which such failure occurs, unless the reason for such failure is based upon good cause as shall be determined by the Director.

III STANDARD OF REVIEW

The pertinent standard of review is provided by Gen. Laws 1956 § 42-35-15(g), a section of the state Administrative Procedures Act, which provides as follows:

¹ The Referee's invocation of Rule 17(F) was quite correct. However, in June of 2014 the rules were revised — that which was Rule 17(F) is now Rule 17(J). See Rules of the Department of Labor And Training for the Unemployment Insurance and Temporary Disability Insurance Programs, (June, 2014), available at <http://www.dlt.ri.gov/pdf/UITDIRules0614.pdf>.

42-35-15. Judicial review of contested cases.

* * *

(g) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority of the agency;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Thus, on questions of fact, the District Court “* * * may not substitute its judgment for that of the agency and must affirm the decision of the agency unless its findings are ‘clearly erroneous.’ ”² The Court will not substitute its judgment for that of the Board as to the weight of the evidence on questions of

² Guarino v. Department of Social Welfare, 122 R.I. 583, 584, 410 A.2d 425 (1980) citing Gen. Laws 1956 § 42-35-15(g)(5).

fact.³ Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.⁴

The Supreme Court of Rhode Island recognized in Harraka v. Board of Review of the Department of Employment Security, 98 R.I. 197, 200, 200 A.2d 595, 597 (1964) that a liberal interpretation shall be utilized in construing and applying the Employment Security Act:

* * * eligibility for benefits is to be determined in the light of the expressed legislative policy that “Chapters 42 to 44, inclusive, of this title shall be construed liberally in aid of their declared purpose which declared purpose is to lighten the burden which now falls upon the unemployed worker and his family.” G.L. 1956, § 28-42-73. The legislature having thus declared a policy of liberal construction, this court, in construing the act, must seek to give as broad an effect to its humanitarian purpose as it reasonably may in the circumstances. Of course, compliance with the legislative policy does not warrant an extension of eligibility by this court to any person or class of persons not intended by the legislature to share in the benefits of the act; but neither does it permit this court to enlarge the exclusionary effect of expressed restrictions on eligibility under the guise of construing such provisions of the act.

³ Cahoone v. Board of Review of the Dept.of Employment Security, 104 R.I. 503, 506, 246 A.2d 213, 215 (1968).

⁴ Cahoone, 104 R.I. at 506, 246 A.2d at 215. Also D’Ambra v. Board of Review, Department of Employment Security, 517 A.2d 1039, 1041 (R.I. 1986).

IV ANALYSIS

A Issue

At the outset we should indicate that section 28-44-12 requires that — in order to be eligible for benefits — a claimant must pass the following three-prong test: that the claimant is able to work, that the claimant be available for work, and the claimant must be actively searching for work. See Gen. Laws 1956 § 28-44-12(a) and § 28-44-12(a)(3), excerpted supra at page 4.⁵ It is the claimant’s burden of proof to meet these conditions. The Referee concluded Mr. Rose was subject to a section 28-44-12 disqualification in the period from April 13, 2013 until June 29, 2013 because he failed to comply with Rule 17(F).

B Evidence of Record

In denying benefits to claimant, Referee Howarth found that Mr. Rose did not comply with Rule 17(F)’s requirements. At this juncture we shall

⁵ It is confusing that section 12 is commonly known as the “Availability” section and that “availability” in a stricter sense is an element of the test.

summarize the testimony and evidence received as the hearing conducted by Referee Capozza.

1

Ms. Ruggieri

The first witness was the representative of the Department of Labor and Training, Ms. Sherry Ruggieri. Referee Hearing Transcript, at 6 et seq. She explained that Mr. Rose's last day of work was August 20, 2013. He then collected temporary disability insurance (TDI) benefits. Referee Hearing Transcript, at 6. He was then instructed to contact the Tele-Serve system on March 30, 2014 for the week ending March 29, 2014. Id. He did so. Id. The next week he did not, but he called the AD office, and they re-filed him. Id. He then used the system for week-ending 4-12. Id.

But he did not call for the week-ending 4-19. Id. He was reinstructed on 4-2, 4-7, and 4-15. Id. It advised him to call in on the next Sunday and every Sunday thereafter. Referee Hearing Transcript, at 6-7. According to Ms. Ruggieri, Mr. Rose refiled on May 11, 2014, and was again instructed to call-in weekly. Referee Hearing Transcript, at 7. After that, he called every week. Id.

According to Ms. Ruggieri, he never tried to use Tele-serve. Ms. Ruggieri said that every time he re-filed he would have once again been told to use Tele-serve weekly. Referee Hearing Transcript, at 8. So too, each time he listened to his benefit rights, he would have been advised to call in weekly. Id.

Finally, the Referee solicited Ms. Ruggieri's comment on the list of call attempts that Mr. Rose submitted to the Board. Referee Hearing Transcript, at 8. She explained that a PIN number comes in the mail. Referee Hearing Transcript, at 9-10.

2

Mr. Rose

Mr. Rose responded that he had trouble getting his PIN number — in fact, it took a couple of months. Referee Hearing Transcript, at 11. Ultimately, he asserted that he was never told he had to call-in to Tele-serve every week. Referee Hearing Transcript, at 14.

C

Rationale

During the weeks in question, it was Claimant's duty — pursuant to Rule 17(F) — to prove he weekly signed in on the Tele-serve program; and this, he

certainly did not do. His own protestations that he did so were not supported by any independent evidence. And, Ms. Ruggieri (on behalf of the Department) refuted his testimony.

Therefore, while there was conflicting evidence presented in the instant case, the Referee's finding that Claimant did not prove compliance with the mandates of § 28-44-12 is certainly supported by the evidence of record — or, specifically, the absence of such evidence. Accordingly, given the fact that the claimant bears the burden of proving all elements of the availability test (and compliance with Rule 17[F]), I cannot find that the Referee's decision on the section 12 issue is clearly erroneous.

V

CONCLUSION

Applying the applicable standard of review, and upon careful review of the evidence, I recommend that this Court find that the decision of the Board of Review (affirming the decision of the Referee) on the issue of disqualification was not clearly erroneous in view of the reliable, probative and substantial evidence on the whole record or arbitrary or capricious. Gen. Laws 1956 § 42-

35-15(g)(5),(6). I therefore recommend that the decision of the Board be
AFFIRMED.

/s/
Joseph P. Ippolito
Magistrate

JANUARY 9, 2015

